

Mailed 4/7/05

THIS OPINION IS NOT CITABLE  
AS PRECEDENT OF  
THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re JMS Labs Limited, LLC.

---

Serial No. 76431539

---

Charles I. Brodsky for JMS Labs Limited, LLC.

Tanya Amos, Trademark Examining Attorney, Law Office 113  
(Odette Bonnet, Managing Attorney).

---

Before Hanak, Quinn and Chapman, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

JMS Labs Limited, LLC. (applicant) seeks to register  
in typed drawing form TANGOS for "naturally and  
artificially flavored sugar free bite size candies packaged  
in a twist-to-open, purse or pocket-sized self-dispensing  
carry along tin in which the sugar free candies fall  
through the 'O' in the Mark when the container tin is  
inverted." The intent-to-use application was filed on July  
15, 2002.

Citing Section 2(d) of the Trademark Act, the Examining Attorney refused registration on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark TANGO, previously registered in typed drawing form for "cookies." Registration No. 1,791,782.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the marks, we find that they are essentially identical in that applicant's mark (TANGOS) is merely the plural form of the cited mark (TANGO). Applicant has never contended that the marks are not essentially identical. Thus, the first Dupont "factor weighs heavily against applicant" because the marks are

essentially identical. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and registrant's goods, we note that because the marks are essentially identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). However, in this case we find that applicant's goods and registrant's goods are closely related. In this regard, the Examining Attorney has made of record approximately 25 third-party registrations showing that the same marks have been registered by the same entity for both candy and cookies. In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1469 (TTAB 1988), aff'd as not citable precedent 88-1444 (Fed. Cir. November 14, 1988).

At page 3 of its brief, applicant argues that its candies are "sugar-free." Presumably, applicant is implying that registrant's cookies contain sugar, and that this causes applicant's goods and registrant's goods to be more dissimilar. Applicant's argument is misplaced. The cited registration lists merely "cookies," a term broad

enough to cover both sugar and sugar-free cookies. It is well settled that in Board proceedings, "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited registration], rather than what the evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). In any event, applicant has offered no evidence to even remotely suggest that registrant's TANGO cookies do not also encompass sugar-free cookies. Finally, we note that during the course of this proceeding, the Examining Attorney made of record five Internet advertisements from different retailers offering for sale both sugar-free candy and sugar-free cookies.

Also at page 3 of its brief, applicant notes that its candies are bite-sized and come in a unique container where the candies fall through the "O" in applicant's mark. However, applicant has never explained why its somewhat unique packaging would in any way cause consumers who are familiar with registrant's TANGO cookies not to assume that TANGOS candy emanated from the same source.

Decision: The refusal to register is affirmed.

Ser. No. 76431539